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IN THE
Supreme Court of the United States
OCTOBER TERM—1944

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No. 1008
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T. FRANK DOLAN, JR., LAURENCE SOVIK and
MERCHANDISE BROKERAGE CORPORATION,
Petitioners,
vs.

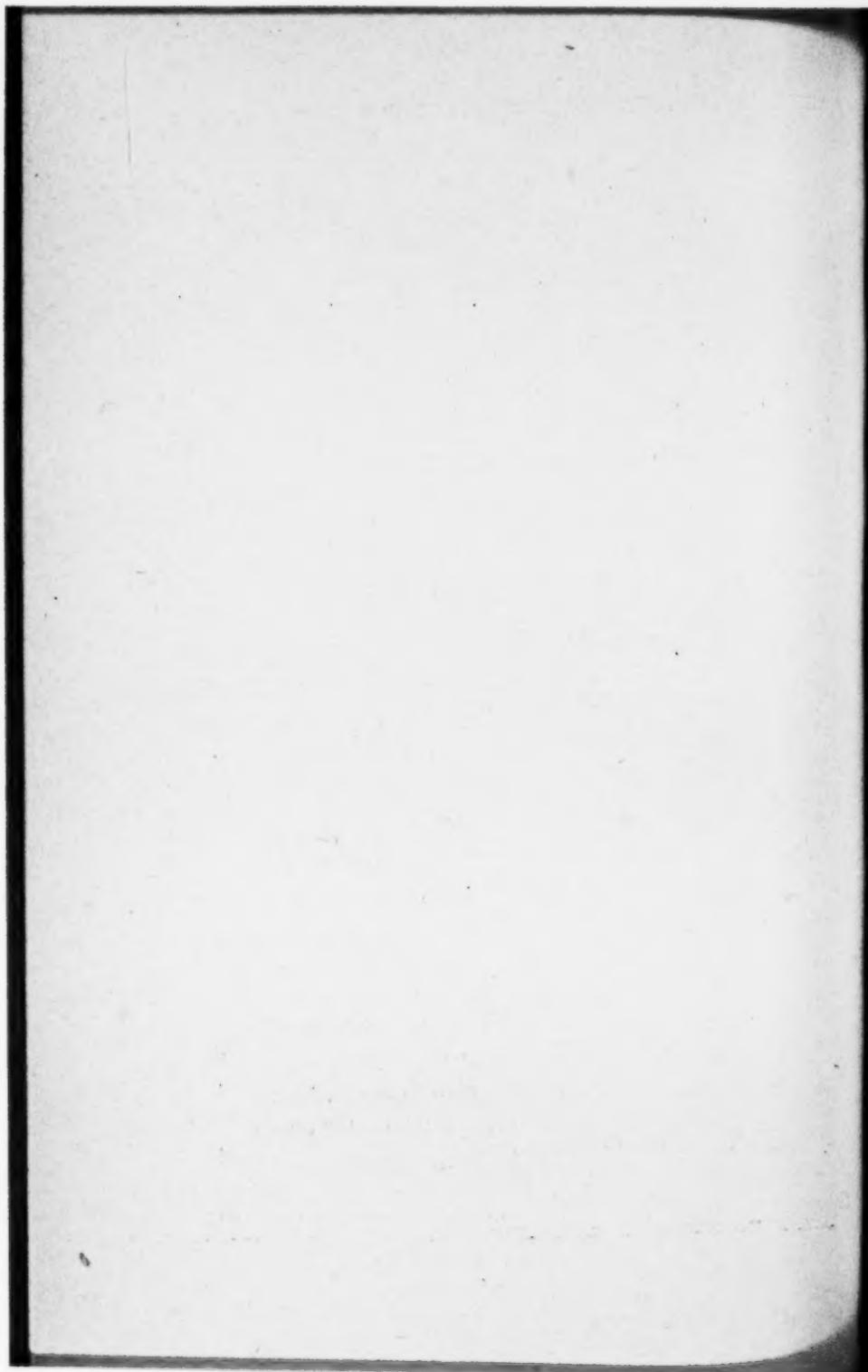
ROBERT R. MEYER and MOKAVA
CORPORATION,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED
STATES CIRCUIT COURT OF APPEALS FOR THE
SECOND CIRCUIT

**RESPONDENTS' BRIEF IN OPPOSITION TO
PETITION FOR WRIT OF CERTIORARI**

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**RESPONDENTS' BRIEF IN OPPOSITION TO
PETITION FOR WRIT OF CERTIORARI**

OPINIONS BELOW

The United States District Court for the Northern District of New York rendered an opinion (R. pp. 86-91) which is not officially reported. The opinion of the Circuit Court of Appeals for the Second Circuit (R. pp. 222-230) is reported in 146 F. (2d) — (C. C. A. 2d, 1945).

JURISDICTION

The decree of the Circuit Court of Appeals sought to be reviewed was entered February 2, 1945 (R. p. 231). Petitioners presumably invoke the jurisdiction of this Court under Section 240(a) of the Judicial Code.

QUESTION PRESENTED

The question presented is whether, upon the facts in this case, the Circuit Court of Appeals for the Second Circuit erred in unanimously reversing two orders of the United States District Court for the Northern District of New York and in remanding the case to said District Court for further proceedings.

STATUTE INVOLVED

This is a proceeding for the reorganization of a corporation under Chapter X of the Bankruptcy Act, 52 Stat. 883-905 (1938), 11 U. S. C. §§ 501-676 (1940).

STATEMENT

This is a proceeding for the reorganization of the Debtor, The Onondaga Hotel Corporation, under Chapter X of the Bankruptcy Act. The proceeding was commenced on January 16, 1939 (R. pp. 18-24). Respondent Meyer did not cause the reorganization petition to be filed. The statement to that effect made by the petitioners (Petition, p. 2) is not supported by the record.

The Securities and Exchange Commission has taken no part in this proceeding. The order approving the plan dispensed with notice to that Commission (R. pp. 80-82).

On March 18, 1944, the Trustee's Plan, as amended by petitioner Dolan's proposals, was approved by the United States District Court for the Northern District of New York (R. pp. 80-82). A hearing was held before the District Court on April 10, 1944, to consider the confirmation of the Plan, and on May 10, 1944, the District Court made and entered an order confirming the Plan (R. pp. 103-113).

Two appeals were taken by Robert R. Meyer and Mokava Corporation, the respondents here, from two separate orders of the United States District Court for the Northern District of New York. One appeal was taken from an order of May 10, 1944, which imposed certain conditions in connection with the approval of an assignment of a mortgage to Robert R. Meyer, hereinafter described (R. pp. 62-66); the other appeal was from the order of confirmation of the Plan, also dated May 10, 1944 (R. pp. 103-113). The two appeals were heard together by the United States Circuit Court of Appeals for the Second Circuit. That Court reversed the orders of the District Court and remanded the case to the District Court.

This is a petition for a writ of certiorari to review the said decree of the United States Circuit Court of Appeals for the Second Circuit.

The Capital Structure of the Debtor

The Debtor had outstanding, in addition to its capital stock, all of one class, the following securities:

Two First Mortgages, each covering a separate part of the Debtor's property, which were placed in the same class by order of the District Court (R. p. 76). This classification the Circuit Court of Appeals held was erroneous. The mortgages were:

(a) A First Mortgage in the principal amount remaining unpaid of \$364,000 and accrued interest, made by the Debtor to Onondaga County Savings Bank, dated October 1, 1908 (R. pp. 209-211), covering a part only of the Debtor's property, *viz.*, the land and building known as the Main Building. This mortgage, on or about August 28, 1943, was assigned to petitioner Dolan (R. p. 177) who

paid therefor a consideration of \$291,000 (R. p. 175). It is now held by petitioners Dolan and Sovik (R. p. 175) and is hereinafter referred to as the "Dolan Mortgage".

(b) A First Mortgage in the principal amount remaining unpaid of \$190,000 and accrued interest, made by the Debtor to First Trust & Deposit Company, dated December 21, 1928 (R. pp. 30-35), covering a part only of the Debtor's property, *viz.*, the land and building known as the Annex which adjoins and connects with the Main Building. This mortgage (hereinafter referred to as the "Annex Mortgage" or the "Meyer Mortgage") was purchased by respondent Meyer on April 1, 1944, on which date he paid to First Trust & Deposit Company the full principal amount and interest accrued to that date aggregating \$268,850 (R. pp. 28-30). First Trust & Deposit Company executed and delivered to respondent Meyer an assignment of said mortgage, absolute in form but subject to a condition that if the District Court should determine the giving of the assignment to be improper or unlawful, respondent Meyer might be required, upon the return of his payment, to re-assign said mortgage to First Trust & Deposit Company (R. p. 29). Prior to April 1, 1944, First Trust & Deposit Company had issued Participation Certificates in this mortgage in the form set forth in the Record (R. pp. 40-42) which provided that said First Trust & Deposit Company might take up and cancel such Certificates at any time on payment of the amount of principal and interest due thereon (R. p. 41). Some of the Participation Certificates did not contain this clause but merely assigned an interest in the bond and mortgage (R. pp. 42, 43) but all of the latter form of Certificates were held by First Trust & Deposit Company itself in other fiduciary capacities (R. p. 37).

(c) A Second Mortgage made by the Debtor to Syracuse Trust Company as Trustee, dated October 1, 1908 (R. p. 73), securing an issue of bonds (hereinafter referred to as the "Consolidated Bonds") outstanding in the aggregate principal amount of \$233,000 (R. p. 87). This Second Mortgage covers only the Main Building, the same property covered by the Dolan Mortgage (R. p. 87). Respondent Meyer, either personally or through his wholly owned corporation (respondent Mokava Corporation) (R. p. 179), holds \$53,000 of these Consolidated Bonds (R. p. 179) and has contracted to acquire more (R. p. 155).

(d) A contingent, unsecured claim in the form of notes guaranteed or endorsed by the Debtor for \$4,603.85, held by petitioner Merchandise Brokerage Corporation for merchandise sold to Onondaga Company, the Debtor's subsidiary (R. p. 190).

The District Court, having found after a hearing that the Debtor was insolvent, on March 18, 1944, made and entered an order approving a Plan of Reorganization submitted by the Trustee, as amended by the proposals of petitioner Dolan (R. pp. 80-82), which provided :

(1) That the face amount of the First Mortgage on the Annex (the Meyer Mortgage) should be paid cash for the amount of the principal and one-half of the accrued interest, receiving preferred stock of the new, reorganized corporation for the other half of such interest;

(2) That the First Mortgage on the Main Building (the Dolan Mortgage) should remain a first mortgage for the amount of its principal, and for its accrued interest should receive a controlling block of the common stock of the new corporation;

- (3) That the Second Mortgage Bonds (Consolidated Bonds) should receive only fifty cents on the dollar in cash; and
- (4) That the unsecured claim of Merchandise Brokerage Corporation should be paid in full in cash (R. pp. 67-72, 80-82).

The said order of March 18, 1944, also provided that the acceptances of the Plan should be filed with the Trustees (such filing to be deemed filing with the Court) and fixed April 5, 1944, as the last day on which acceptances could be filed (R. p. 81).

Circumstances of Respondent Meyer's Purchase of the Annex Mortgage

Respondent Meyer, who held a controlling interest in the stock of the Debtor (R. p. 178), caused to be served on First Trust & Deposit Company (hereinafter called the "Trust Company") on April 1, 1944, a demand in accordance with Section 275 of the New York Real Property Law, requiring an assignment of said mortgage to him upon payment to the Trust Company of the full principal amount and accrued interest (R. p. 43). In view of the execution and delivery of the assignment to respondent Meyer, it is unnecessary to consider the validity of this demand and the Circuit Court of Appeals correctly so held (R. p. 228).

On April 1, 1944, respondent Meyer tendered the Trust Company the sum of \$268,850 in cash which was the full amount due on the principal and accrued interest of the First Mortgage on the Annex building (R. pp. 28, 29).

The Trust Company accepted the money so tendered by respondent Meyer and on April 1, 1944, executed and delivered to him an assignment of the said mortgage containing the following condition:

"1. That the question of whether or not acceptance of such payment and the giving of this assignment is proper and legal under all the circumstances be presented for determination to the United States District Court for the Northern District of New York in the proceeding entitled 'United States District Court, Northern District of New York, In the Matter of The Onondaga Hotel Corporation, Debtor, In Proceedings for the Reorganization of a Corporation, No. 27263,' on or before May 1, 1944, and this assignment shall be void and of no effect if the Court determines the giving thereof improper or unlawful by reason of violating rights of any participation holders or otherwise, in which event said sum of \$268,850 shall be repaid without interest, and said Robert R. Meyer, his heirs or assigns, shall thereupon execute and deliver a reassignment of such mortgage to the undersigned or its assigns." (R. p. 29)

Another condition not relevant here was also contained in the assignment. This assignment was an absolute transfer of this mortgage to respondent Meyer, subject to the reserved right to a reassignment if it were disapproved by the District Court (R. pp. 28, 29). Promptly upon his purchase, on April 1, 1944, respondent Meyer delivered to the Trustee a rejection of the Plan (R. p. 92).

It was unnecessary for respondent Meyer to deal with the holders of the various Participation Certificates since such Certificates were callable at any time by the Trust

Company (R. p. 41). In fact the Trust Company was charged with the duty, on receipt of the interest and principal of the mortgage, to "distribute the same among the persons entitled thereto" (R. p. 41). This last provision necessarily implies that an interval might be expected to elapse between the time of the receipt of funds by the Trust Company and ultimate payment by it to a participant, especially as the mortgage was overdue when purchased by respondent Meyer.

On April 6, 1944, the Trust Company filed a petition in the District Court which referred to the demand, tender and assignment of the Annex Mortgage to respondent Meyer (R. pp. 37-43) and asked the Court to make "a determination of the matters and questions which such conditions provide shall be presented to and determined by" the Court (R. p. 40).

This petition came on for hearing on April 10, 1944 (R. pp. 40-114). At this hearing the District Court announced that "I shall not refuse the First Trust Company the right to assign their mortgage" (R. p. 129). The whole procedure was obviously unnecessary. No court approval is necessary to permit anyone holding securities of a corporation involved in reorganization to transfer them.

In spite of the statement just referred to, the District Court deferred signing any order until May 10, 1944 (R. pp. 62-66), the same day on which the order of confirmation was signed (R. pp. 103-113).

The District Court in this order of May 10, 1944, held that it would not permit respondent Meyer to vote on the Plan as the holder of the Annex Mortgage. Said order contained the following provisions:

"THIRD: That this Court, subject to the provisions in Paragraph 'FIFTH' hereof, makes no disapproval of the assignment of said mortgage as a voluntary act and, subject to the provisions in Paragraph 'FIFTH' hereof, consents thereto.

FOURTH: That the acceptance of all participation certificate holders—which have been filed prior to this hearing—be deemed to have been filed as of April 5, 1944.

FIFTH: That the approval given by this Court to said assignment as hereinbefore set forth does not and shall not deprive owners of participation certificates, who had not on April 10, 1944 been paid nor had payment tendered to them for their certificates with interest, of their right to vote upon or participate in the plan presented by T. Frank Dolan, Jr. under date of February 24, 1944, which plan is now before this Court for confirmation." (R. p. 66)

Thus, the District Court did not determine that the assignment of the mortgage dated April 1, 1944, from the Trust Company to respondent Meyer was improper or unlawful. On the contrary, the District Court consented thereto but attached a condition that the assignment should not deprive the owners of the Participation Certificates of their right to vote on the Plan.

The end result of all this was that respondent Meyer did not get his money back to which he was clearly entitled under the terms of the assignment in the event that the District Court should not approve the same (R. p. 29) and the District Court refused him the right to vote as the owner of the mortgage. Instead, the holders of the Participation Certificates in the mortgage paid off in full, principal and interest, were allowed to retain the right to

vote on a Plan of Reorganization of a Debtor in which they no longer had any interest whatsoever.

The Circuit Court of Appeals correctly held this to be error, stating:

"Accordingly, the district court erred in its order allowing the acceptances of the certificate holders to be counted and in refusing to consider Meyer's vote against the plan." (R. p. 229)

ARGUMENT

POINT I

The Decision Below was Correct; the District Court's Denial of Meyer's Right to Vote on the Plan as the Owner of the Annex Mortgage was Obviously Error.

The petitioners' brief asserts that if Meyer did not effectively acquire the First Trust Mortgage through the assignment, then the whole basis of the Circuit Court's decision fails (Petition, p. 27). Assuming for the purposes of argument that this statement is correct, nevertheless, the difficulty with petitioners' position is precisely that Meyer did effectively acquire the mortgage on the Annex from the Trust Company.

There can be no question about the facts. On April 1, 1944, the attorney for Meyer delivered to the Trust Company a certified check in the amount of \$268,850 in full payment of the principal due and interest accrued to that date on the mortgage on the Annex Building (R. p. 118). With that payment there was served upon the Trust Company a demand signed by the Debtor, by one of its officers, for an assignment of this mortgage to Meyer (R. p. 118).

The Trust Company executed and delivered an assignment to respondent Meyer dated April 1, 1944, (R. pp. 28, 29) which provides in part as follows:

"* * * First Trust & Deposit Company, in consideration of \$268,850 paid to it as above stated, hereby assigns, without recourse, to Robert R. Meyer the mortgage dated December 21, 1928, given by the Onondaga Hotel Corporation * * *." (R. p. 28)

Then follows the condition referred to and quoted above in this brief (p. 7).

With respect to this transaction, the Circuit Court of Appeals said:

"Meyer effectively acquired that mortgage through his purchase and the assignment thereof on April 1, 1944. * * * For, as the Court below said, the First Trust made a valid voluntary assignment * * *." (R. p. 228)

We fail to see how anyone can successfully dispute that statement. But the petitioners say the District Court did not hold that it was a "voluntary" assignment (Petition, p. 29). This statement is completely refuted by the record of the proceedings in the District Court. The District Court said at the hearing on April 10, 1944:

"* * * I consider the demand just a nullity. That does not prevent the First Trust and Deposit or any party interested from selling their interest, but it must be considered as a voluntary sale rather than a sale based upon any demand and it must not be considered something that they had to do in order to comply with the demand." (R. p. 116)

And again the District Court said:

"I shall not refuse the First Trust Company the right to assign their mortgage. * * * The First Trust can assign if they want to, but I shall rule that all holders of certificates in that mortgage today have the right to vote on the approval or disapproval of the plan." (R. pp. 129, 130)

Furthermore, in the order of the District Court dated May 10, 1944, the following paragraph appears:

"SECOND: That the First Trust & Deposit Company was not obligated to comply therewith and that the assignment of the mortgage given by the above-named debtor, The Onondaga Hotel Corporation, dated December 21, 1928, and recorded in the Onondaga County Clerk's Office December 27, 1928, must be considered a voluntary sale and not one in compliance with the aforesaid demand." (R. p. 65)

Clearly, the District Court did hold that it was a voluntary assignment.

Moreover, that Court made no disapproval of the assignment. The same order of the District Court continued:

"THIRD: That this Court, subject to the provisions in Paragraph 'FIFTH' hereof, makes no disapproval of the assignment of said mortgage as a voluntary act and, subject to the provisions in Paragraph 'FIFTH' hereof, consents thereto." (R. p. 66)

But the District Court, while making no disapproval of the assignment of the mortgage as a voluntary act, nevertheless, effectively prevented respondent Meyer from voting on the Plan as the owner of that mortgage, by providing that the owners of the Participation Certificates had the right to vote upon the Plan (R. p. 66).

Section 203 of the Bankruptcy Act (52 Stat. 894 (1938), 11 U. S. C. § 603 (1940)) provides the method by which, in certain cases, a claim may be disqualified from voting. Such disqualification may be made in a proper case only "after hearing upon notice". The District Court did not follow any such procedure here. Even if it had, the circumstances in this case would not have justified disqualification.

In re Pine Hill Collieries Co., et al., 46 F. Supp. 669 (E. D. Pa., 1942);
Texas Hotel Securities Corporation v. Waco Development Co., 87 F. (2d) 395 (C. C. A. 5th, 1936), cert. denied 300 U. S. 679; *In re Pressed Steel Car Co.*, 16 F. Supp. 325, 337 (W. D. Pa., 1936).

There is no conflict among the Circuits on this point. The case of *Herbert V. Apartments Corp. v. Mortgage Guarantee Co.*, 98 F. (2d) 662 (C. C. A. 3d, 1938), cert. denied 305 U. S. 640, seems to be cited by the petitioners as in conflict with the decision of the Court below to the effect that Meyer's purchase of the Annex Mortgage and the assignment of it to him divested the Participation Certificate holders, including Dolan, of any interest in the mortgage (Petition, pp. 16, 17). There is not the slightest conflict between the *Herbert* case and the decision of the Court below. In the *Herbert* case there was never any question of a sale or assignment. The main question was whether or not holders of Participation Certificates who had given the mortgage company power of attorney to represent them in a proceeding under Section 77B were "creditors" entitled to notice under the Bankruptcy Act.

The Court held that even though these certificate holders had given power of attorney to the mortgage company, they were entitled to notice. We fail to see any similarity whatever between that situation and the facts of the instant case.

Nor do the opinions in *In re Castle Beach Apartments, Inc.*, 113 F. (2d) 762 (C. C. A. 2d, 1940), or in *In re Bliring Realty Corporation*, 114 F. (2d) 100 (C. C. A. 2d, 1940), cited by the petitioners (Petition, pp. 25, 26), disclose any conflict with the decision of the Court below in the case at bar. In the cases cited, one of the questions was whether the trustee for the benefit of the holders of participation certificates had the power to vote in the place of such holders. Obviously there is no such question here.

It is clear that respondent Meyer, as the sole owner of the Annex Mortgage by assignment from the Trust Company, should have been permitted to vote on the Plan of Reorganization rather than the holders of the Participation Certificates, and that the failure of the District Court to permit him to do so was error, as the Court below has held.

POINT II

The Court Below Correctly Held that it was Error for the District Court to Lump Together Two First Mortgages on Different Properties of the Debtor and then to Give Substantially Different Treatment to those Mortgages in the Plan.

It has been repeatedly held that where there are two first mortgages covering different properties, it is necessary to examine the underlying security and to determine with respect to the ratio of debt to security value and other fac-

tors, whether or not the two groups of security holders should be treated equally.

Group of Investors v. Milwaukee R. R. Co.,
318 U. S. 523 (1943);

Ecker v. Western Pacific R. Corp., 318 U. S.
448, 482 (1943);

Consolidated Rock Products Co. v. Du Bois,
312 U. S. 510 (1940);

Gerdes on Corporate Reorganizations, Section
1045.

The petitioners point out that no appeal was taken from the order of the classification (Petition, p. 10). However, the petitioners ignore the fact that at the time the classification order was entered, the present Plan of Reorganization, as amended, and as confirmed, was not before the court. The Court below has correctly stated in its opinion that:

"* * * We need not, therefore, consider whether a failure to appeal from a classification order, entered when a plan is before the Court precludes a later appeal from the order approving a plan, challenging the fairness of that plan, which raises the validity of the classification order. * * *" (R. p. 228)

The petitioners contend that the Trustee's Plan dated April 7, 1943, was before the court (Petition, pp. 16, 19), but it was the Trustee's Plan *as amended* by the proposals of petitioner Dolan, dated February 24, 1944, which was approved by the order of the District Court of March 18, 1944 (R. pp. 80-82). Obviously, this amended Plan could not have been before the court when the classification order was entered on April 30, 1943.

There is, therefore, no conflict between the decision of the Court below and the decision of the Seventh Circuit in the case of *In re Irving-Austin Building Corporation*, 96 F. (2d) 905 (C. C. A. 7th, 1938), which is relied upon by the petitioners (Petition, pp. 10, 11). It clearly appears from the record on appeal in that case that there was no amendment of the plan after the order of classification. The plan in its final form as amended was before the court when the order of classification was entered.

The Court below did not hold that the order of classification must be made when a plan of reorganization is before the court (Petition, p. 8), and there is no conflict with the decision of the Fifth Circuit in *Texas Hotel Securities Corporation v. Waco Development Co.*, 87 F. (2d) 395 (C. C. A. 5th, 1936).

The appeal to the Court below brought up for review the order of the District Court confirming the Plan (R. p. 10). The fact that no appeal was taken from the order of the District Court approving the Plan is unimportant since Section 180 of the Bankruptcy Act (52 Stat. 892 (1938), 11 USC § 580 (1940)) provides that the order approving the Plan shall not affect the right of a creditor to object to the confirmation of the Plan.

The petitioners also contend that the decision of the Court below is in conflict with the decision of the Seventh Circuit in the case of *In re Palisades-on-the-Desplaines*, 89 F. (2d) 214 (C. C. A. 7th, 1937). There, separate first mortgages on 22 different parcels of real estate were placed in the same class. In that case, however, the Circuit Court of Appeals for the Seventh Circuit recognized the general rule in reorganization proceedings that all creditors of equal rank with claims against the same property should be placed

in the same class, and that creditors with claims against different properties should be placed in different classes. But the court held that in the peculiar circumstances of that case, the District Court was justified in making an exception to the general rule. In that case, the facts were that the secured creditor objecting to the plan admitted that the real property upon which he held a mortgage was worth only one-fourth of his claim, and the court held that he could not complain of a plan which, if successful, would result in his receiving 70% of his claim, and, if unsuccessful would result in his receiving the security without foreclosure. Obviously, in these circumstances, the creditor was not harmed by the classification. But the court's reasoning supports the general rule and notes that that case constituted an exception. There is nothing in the facts of the case at bar which affords any excuse whatever for a departure from the general rule.

Moreover, in the case at bar, the error in classification was aggravated when the District Court approved and confirmed a Plan which afforded substantially different treatment to the holders of the two first mortgages. The principal of the Dolan Mortgage is to remain outstanding and the accrued interest thereon to be discharged by the issuance of a controlling block of the common stock of the new corporation (R. pp. 67-69). Contrast this with the treatment given to the Meyer Mortgage which is to receive payment in cash for the principal and one-half of the accrued interest, and to receive preferred stock of the new corporation for the other half of such interest (R. p. 67). There is accrued unpaid interest on the Meyer Mortgage in the amount of \$78,850 as of April 1, 1944 (R. p. 28), so that the result of this provision is that respondent Meyer

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was forced to accept more than \$39,000 in preferred stock of the new corporation in discharge of half of the accrued and unpaid interest due on his mortgage. Accrued and unpaid interest is entitled to protection as well as principal. *In re Janson Steel & Iron Co.*, 47 F. Supp. 652 (E. D. Pa., 1942).

The petitioners assert that this preferred stock continued to remain a first lien on the Annex and also became a lien on all the rest of the Debtor's assets (Petition, p. 18). This statement is completely unsupported by any reference to the record, and we fail to find any provision in the Plan whereby the preferred stock of the new corporation becomes a lien on the Annex or the rest of the Debtor's assets.

The Circuit Court of Appeals was correct when it held that "the error here was aggravated when the Court approved a plan according very substantially different treatment to the two mortgages." (R. p. 228)

POINT III

The Court Below Correctly Held that the District Court Erred in its Treatment of the Holders of Consolidated Bonds.

The District Court confirmed the Plan without acceptance by the requisite amount of the Second Mortgage or "Consolidated Bonds" and disposed of them entirely both as to principal and interest by payment of 50% of their principal amount (R. p. 70). There was no hearing held after notice to the holders of the Consolidated Bonds, at which evidence was taken to support that finding. Indeed,

the District Court denied counsel for holders of these Bonds the right to file objections to the Plan (R. p. 157).

It is obviously no answer to say that the District Court's valuation of the Consolidated Bonds was based upon the evidence in the solvency trial, as there the issue was entirely different, nor is it any answer to suggest that respondent Meyer is in some way estopped from asking for more than 50% of the Consolidated Bonds which he holds. Many persons other than Meyer are holders of these Consolidated Bonds (R. pp. 153, 190). Moreover, respondent Meyer, at the hearing before the District Court on May 10, 1944, took a proper exception to the Court's ruling fixing the value of the Consolidated Bonds at 50% (R. pp. 169, 170). Obviously, therefore, there is no conflict between the decision of the Court below and the decision of the Seventh Circuit in the case of *In re Waern Building Corporation*, 145 F. (2d) 584 (C. C. A. 7th, 1944) where the objection was raised for the first time on appeal.

Similarly, there is no conflict between the decision of the Court below and that of the Ninth Circuit in the case of *Mason v. Eldorado Irrigation District*, 144 F. (2d) 189 (C. C. A. 9th, 1944) where there was no claim of any harm suffered by the objecting creditor because of omission of notice of hearing on the final decree, or the holding of the Fourth Circuit in *Pullman Couch Co. v. Eshelman, et al.*, 1 F. (2d) 885 (C. C. A. 4th, 1924) where there was a substantial compliance with the statute by notice given at a legal meeting of creditors.

POINT IV**The Court Below Correctly Held that the District Court Erred in Confirming a Plan which Provided for Full Payment in Cash to an Unsecured Creditor and not to the Holders of the Second Mortgage Bonds.**

The Plan confirmed by the District Court provides that the claim of petitioner Merchandise Brokerage Corporation shall be paid in full without interest (R. p. 71), while holders of the Second Mortgage or Consolidated Bonds were to be paid 50% of the principal amount in full payment of principal and interest (R. p. 70).

The petitioners now assert that no issue was raised by respondent Meyer with respect to this provision for full payment in cash of petitioner Merchandise Brokerage Corporation (Petition, p. 24). This is not correct. Respondent Meyer's objections to the confirmation of the Plan dated April 7, 1944, specifies as one of the grounds of his objections that the Plan provides for payment in full of contingent creditors set forth in Class 9 (Merchandise Brokerage Corporation) and fails to provide the same treatment for the creditors in Class 8 (Consolidated Bondholders), and that such treatment is unfair, unjust and inequitable (R. p. 94). Thus, this point was not raised for the first time on appeal and there is no conflict between the decision of the Court below and the decision of the Seventh Circuit in *In re Waern Building Corporation*, 145 F. (2d) 584 (C. C. A. 7th, 1944) or with the decision of the Seventh Circuit in *Maloney v. Brandt*, 123 F. (2d) 779 (C. C. A. 7th, 1941).

Obviously respondent Meyer's objection to the treatment of the claim of petitioner Merchandise Brokerage Corporation should have been sustained by the District Court, and the Circuit Court of Appeals correctly so held (R. pp. 229, 230). *Case v. Los Angeles Lumber Products Co.*, 308 U. S. 106 (1939).

POINT V

There is no Conflict with Decisions of Other Circuit Courts and the Case is of no General Importance.

As we have shown in our discussion under the preceding points, there is no conflict between the decision of the Court below and other Circuit Courts.

The case depends upon its own special facts, and the decision below does not lay down any novel principle of Federal Bankruptcy Law.

The petitioners assert that what the Court below has done is to grant to Meyer the right to vote claims in bankruptcy owned by Dolan (Petition, p. 34). This statement is clearly incorrect. Instead, what the Court below has done is to recognize Meyer's right to vote claims in bankruptcy which he owns (the Annex Mortgage), and for which he paid in full, principal and interest (R. p. 118), and to deny to the holders of Participation Certificates who were paid off in full the right to retain their votes on a Plan for the reorganization of a Debtor in which they no longer had any interest.

Conclusion

The case was correctly decided below; there is no conflict of decisions, and the decision below is of no general

importance as it depends upon the special facts of this case.
The petition for a writ of certiorari should be denied.

Respectfully submitted,

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March 21, 1945.

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